90-1772

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LAWRENCE E. LEWY, *et al.*,
Petitioners,

V.

VIRGINIA DEPARTMENT OF TAXATION

Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

JOSEPH B. HYMAN*
ECHOLS & HYMAN
1515 North Courthouse Road
Suite 503
Arlington, Virginia 22201
703/527-1334

LAWRENCE E. LEWY
King's Court Townhouse Offices
4510 Old Columbia Pike
Annandale, Virginia 22003
Attorneys for Petitioners

*Counsel of Record

PRINTING INC. OF VIRGINIA - 641-0300 - FAIRFAX, VA 22031

QUESTIONS PRESENTED

1. Did the provisions of the public Salary Act of 1939, codified as 4 USC 111, become part of the supreme law of the land in accordance with the second paragraph of Article VI and therefore binding on state courts when it was enacted pursuant to the provisions of Section 7 of Article I of the Constitution of the United States, or were they without legal effect and not binding on the states until passed on and applied as constitutionally valid by this court in *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803, (1989) ?

2. Can the decision of this Court in *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803, (1989) be properly held to have only prospective effect on the basis of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1989)?

PARTIES TO THE PROCEEDING

The petitioners are the following twenty-eight persons receiving federal retirement benefits, civil or military or both, who paid to the Commonwealth the income taxes levied by it on those benefits:

Lawrence E. Lewy and Miriam Lewy
Eugene A. Bennett
Ralph J. Broberg and Rose Broberg
Gerald M. Boatwright and Carol Boatwright
Robert V. Brown and Nancy L. Brown
Donald L. Burt and Lydia Burt
Claude B. Cross and Alta Rae Cross
Charles L. Gibb and Isabelle C. Gibb
Franklin P. Michels and Elizabeth M. Michels
Joseph E. Mazur and Barbara I. Mazur
Paul N. Pfeiffer and Jean Z. Pfeiffer
Merritt Ruhlen and Florence E. Ruhlen
Donald L. Sallee and Myra N. Sallee
Robert R. Valdez and Doris Mae Valdez
Walter G. Walker, Jr.

The Virginia Department of Taxation was the defendant below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
REASONS FOR GRANTING THE PETITION	3
CONCLUSION	10
APPENDIX	11

TABLE OF AUTHORITIES

Cases: Page

American Trucking Ass'ns v. *Smith*, 110 S. Ct. 2323 (1990) 8
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) ..... *passim*
Davis v. *Michigan Department of Treasury*, 489 U.S. 803 (1989) ..... *passim*
Kizas v. *Webster*, 707 F.2d, 524 (D.C.Cir. 1983) *Certiorari denied*, 464 U.S. 1042 (1984) 9
McKesson v. *Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238 (1990) ..... *passim*
Montana National Bank of Billings v. *Yellowstone, County* 276 U.S. 499 (1928) 9
Robinson v. *Neil*, 409 U.S. 505 (1973) 4
United States v. *Security Industrial Park*, 459 U.S. 70 (1982) 4

Statutes:

4 U.S.C. § 111 ..... *passim*
28 U.S.C. § 1257(a) 2
Code of Virginia § 58.1-322(c) (3) 2
Code of Virginia § 58.1-1825 2

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PETITION FOR A WRIT OF CERTIORARI

Lawrence Lewy and other named petitioners receiving federal civil and/or military retirement benefits petition this Court for a Writ of Certiorari to the Supreme Court of Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia (Harper App. A, at 1a-12a) is reported at 401 S.E. 2d 868 The decision of the trial court, the Circuit Court for the City of Alexandria (*Harper, et al.* V. *Virginia Department of Taxation*, No. 90-1685, App. C, at 13a-16a) is unpublished.

JURISDICTION

The Supreme Court of Virginia issued its opinion affirming the trial court and denying petitioners' entitlement to tax refunds on March 1, 1991. Harper App. A at 1a, Harper App. B at 2a. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

STATEMENT

In *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803 (1989), this Court held that 4 U.S.C. Section 111 prohibits States from taxing federal retirement benefits while exempting their own such payments from taxation. The Commonwealth of Virginia, like Michigan and approximately twenty other states, exempted its own retirement benefits from taxation while taxing those paid by the federal government. See Code of Virginia 58.1-322(c) (3) (1984). Petitioners are retired federal employees, some receiving both civil service and military retirement pay and some receiving one or the other. The petitioners have paid the Commonwealth the income tax prescribed by law.

Following this Court's decision in *Davis*, supra, some petitioners filed tax refund actions in various circuit courts in Virginia. These actions were consolidated before the Circuit Court for the City of Alexandria. Refunds were claimed for tax years 1985, 1986, 1987 and 1988.

Under Virginia law, taxpayers are entitled to seek refunds of taxes that have been "erroneously or improperly assessed." Code of Virginia 58.1-1825 (1985). Virginia law contains no "protest" requirement as a prerequisite for tax refund claims.

The Circuit Court for the City of Alexandria denied petitioners' refund claims based upon its view that this Court's decision in *Davis* was to be applied only prospectively pursuant to the *Chevron* analysis. Harper App. B at 15a. Petitioners appealed to Virginia's Supreme Court, which affirmed the trial court's analysis and holding. Harper App. A at 1a, App. B at 5a-9a.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 7.

Article VI.

Amendment XIV provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

REASONS FOR GRANTING THE PETITION

1. Applying the provisions of the Public Salary Act of 1939, codified as 4 USC 111, this Court in *Davis* v. *Michigan Department of Treasury,* 489 U.S. 803 (1989), held that it was unlawful for Michigan to levy an income tax on federal retirement income while exempting from such taxation its own retirement benefits. Over twenty states have similar schemes of taxation. The result has been litigation in the various States with varying results and confusion. *Davis* has been applied in some courts and disregarded in others, depending on the particular court's view of the latitude given it by *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971) to find *Davis* of only prospective effect.

In this case, the Michigan and Virginia scheme of taxation could be described as identical twins. Nevertheless the Supreme Court of Virginia, affirming the judgment of the Circuit Court of the City of Alexandria, ruled that the petitioners had no right to a refund of taxes paid by them on their federal retirement income during the years 1985-1988, or, indeed, any other relief.

The Supreme Court of Virginia, like the trial court, based its decision on *Chevron Oil Co.* It ruled that this Court's decision in *Davis* had only prospective effect and that the Virginia tax was accordingly lawful before that decision. That being so, it went on to find that, before March 1989, the Virginia tax was not a taking of property without due process and that the petitioners were not entitled to a remedy under the Fourteenth Amendment or under Virginia law..

Whether another court can ignore a decision of this Court by invoking *Chevron Oil Co.* when this Court has not itself limited the effect of its decision is doubtful, especially in view of the presumption that decisions have a retrospective effect. *United States* v. *Security Industrial Park* 459 U.S. 70, 79 (1982); *Robinson* v. *Neil*, 409 U.S. 505, 507-8 (1973). But given the plain language of Article I, Section 7, and what is not said in Article III of the Constitution, the decision of the Supreme Court of Virginia is clearly wrong.

In the opinion of the Virginia Supreme Court there is not so much as a reference to 4 U.S.C. 111 which this Court considered and applied in *Davis*. However, the question before the Virginia court was not whether it could ignore the opinion in *Davis*, but whether it could ignore the provisions of the law enacted in 1939 by the Congress pursuant to the Constitution. The answer to that question also is clear.

Article I, Section 7 of the Constitution sets out the procedure for passing bills and resolutions:

> All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.
>
> Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to the house in which it shall have orginated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any

> bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.
>
> Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

The plain meaning is that a constitutionally valid statute enacted under the procedure set out becomes a law and takes effect when passed by the Congress and signed by the President, as was done with the Public Salary Act of 1939.

The second paragraph of Article VI is the Supremacy Clause:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Its meaning is also clear. A law enacted by the Congress pursuant to the Constitution is part of the supreme law of the land and the judges of the state courts are bound by it despite anything in the constitution or the laws of the state to the contrary.

There is nothing in Article III to suggest that a law enacted by the Congress is to have legal effect, to become part of the supreme law of the land only when and as accepted by the judiciary. The courts may find an act of the Congress beyond

its constitutional powers and therefore a nullity; but that is the extent of their power over the legislative process. If a constitutionally valid statute has been enacted pursuant to the Constitution it is law from the date of its enactment and it follows that 4 USC 111 had legal effect from the beginning of 1939 and did not take effect piecemeal only as applied by the courts, only when construed and applied in particular cases.

In *Davis* this Court was considering and giving effect to 4 USC 111. It made repeated references to the statute in its opinion. Its discussion of intergovernmental tax immunity related to the constitutionality of the provision, which it accepted, and the kind of discrimination forbidden. The Michigan tax was found unlawful as a violation of a valid act of the Congress which was part of the supreme law of the land. The Virginia courts were consequently bound by the statute, bound to enforce it and without any power to restrict its effect after its being enacted pursuant to the Constitution. What was before the Virginia court was the Public Salary Act of 1939, not the Public Salary Act of March 29, 1989, the date of the *Davis* decision.

It follows that the taxes paid by the taxpayer/plaintiffs were levied in violation of law as they claimed. The exaction of an unlawful tax has long been recognized by this court as the taking of property without due process in violation of the Fourteenth Amendment. *McKesson* v. *Division of Alcoholic Beverages & Tobacco* 110 S.Ct. 2238 (1990) and cases cited therein.

The Virginia court found that the taxpayers could have no relief under the Virginia statute providing relief for taxes "erroneously or improperly assessed" within the meaning of Code of Virginia 58.1-125. But *McKesson* dealt with and prescribed the relief due taxpayers who are unlawfully taxed by a State. There this court ruled that such taxpayers are due a clear and certain remedy, either by way of refund or some equivalent relief:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. At page 2247.

Both in the trial court and in the Supreme Court of Virginia the Commonwealth pleaded poverty. That plea was heard with sympathy and was accepted as a ground, or the ground, for denying relief to the taxpayers. However, the same plea was advanced by Florida in *McKesson* and disposed of by this court in its unanimous opinion:

> We reject respondent's intimation that the cost of any refund considered by the State might justify a decision to withhold it. Just as a State may not object to an otherwise available remedy providing for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or moneys useful, so also Florida cannot object to a refund here just because it has other ideas about how to spend the fund. At page 2257.

This case presents a question of basic importance: When does an act of the Congress, enacted pursuant to the Constitution, take effect and become a part of the supreme law of the land. Put another way, the question is whether a state court or any court can postpone the legally effective date of such an act as it sees fit. As all the world knows, this is a government based on the principle of what is called the separation of powers. There are three branches of the government and none may intrude on the power of the others. In this case there is a constitutionally valid act of the Congress applied by this court in *Davis*. It forbade the kind of discriminatory tax imposed by Michigan, as by Virginia, and it forbade it, so to speak, from Day One.

Concurring in *American Trucking Associations* v. *Smith*, 110 S.Ct. 2323 (1990), Justice Scalia stated the traditional view that courts do not legislate. It is certain that this Court was not legislating in *Davis*. The Congress had already done that and had prohibited the kind of discrimination in which Virginia indulged itself for over forty years. But the taxpayer/plaintiffs were not estopped from calling for relief when they did. Acts of Congress do not waste away and vanish. Surely no state acquires a right to violate an act of Congress by prescription. The Supreme Court of Virginia was bound by 4 USC 111 from the date it became law, fifty years before the decision in *Davis*, and it was bound to apply it in this case under the Supremacy Clause.

To accept the position of the Virginia courts is to write into the Constitution a further step in the legislative procedure set out in Section 7 of Article I. Section 7 would then be read as providing that legislation passed by Congress and signed by the President or passed over his veto is a nullity, has no legal effect, and is binding on no one until receiving judicial ratification. Before such ratification acts of Congress passed pursuant to Section 7 would exist in a legal purgatory waiting for judicial endorsement. Having received such an endorsement, then and only then would an act of Congress become law with the effect provided by the Supremacy Clause. This is in essence what the Supreme Court of Virginia has asserted in this case. Its decision requires correction by this Court. Such correction would end the confusion in all the litigation that has followed from *Davis*. As noted, over twenty states had taxing statutes like those of Michigan and Virginia. The cases brought by taxpayers following *Davis* in various states have led to varying and contradictory results, with relief to the taxpayers in some and with denial of relief in others. A ruling from this Court that *Chevron Oil Co.* does not apply in a case involving the application of a valid act of the Congress would dispose of an issue present here and one likely to reappear in later cases.

2. The petitioners do not see how *Chevron Oil Co.* can have any application to *Davis*, which did no more than interpret and apply a valid act of the Congress. The situation would have been different if *Davis* had involved reinterpretation of 4 U.S.C. 111 reversing an earlier decision. However, if *Chevron Oil Co.* were invoked here it would seem to petitioners that *Davis* does not meet the tests set out in *Chevron*.

The first test requires a finding that *Davis* reversed existing precedent or reached a result that could not have been foreseen. In fact *Davis* reversed no precedent of this or any other court. And the only unforeseeable ruling claimed by the Commonwealth is that *Davis* treated federal retirement benefits as deferred payment for past services. This view was foreshadowed by *Kizas* v. *Webster* 707 F.2d, 524 (D.C. Cir. 1983), Cert. denied 464 U.S. 1042 (1984). Moreover, it has long been recognized that retirement benefits both state and federal are an intrinsic element in determining federal and state wages and salaries and are measured by the length of service and wages or salaries of the recipient during active employment.

Further, as to the second *Chevron* test, *Davis* held that the Congress had forbidden the kind of discriminatory taxation in which Virginia engaged. To give that prohibition only prospective effect would not cure the mischief of Virginia's collection of illegal taxes but would only condone it. Cf *Montana National Bank of Billings* v. *Yellowstone County*, 276 U.S. 499 (1928).

Finally, Virginia's argument that it would be inequitable to have it pay back what it unlawfully took involves an illogical result. This Court's reply to the same argument by Florida in *McKesson*, quoted above, would seem to dispose of this point. Virginia's position is in essence that the protection of the Due Process Clause of the Fourteenth Amendment diminishes in direct proportion to the amount of property wrongfully taken. Virginia would be, presumably, under a duty to restore a taking of $300, but would be free to keep an illegal taking of $300,000,000 or more as in this case. It would be a very odd result.

These points are made in the discussion at greater length of the *Chevron Oil Co.* issue in the petition filed in the companion case, *Harper* v. *Virginia Department of Taxation,* and petitioners herein adopt the more detailed agruments in that petition.

CONCLUSION

For the reasons stated above, the petitioners ask that a writ of certiorari to the Supreme Court of Virginia be granted.

Respectfully submitted,

JOSEPH B. HYMAN*
ECHOLS & HYMAN
1515 North Courthouse Road
Suite 503
Arlington, Virginia 22201
703/527-1334

LAWRENCE E. LEWY
King's Court Townhouse Offices
4510 Old Columbia Pike
Annandale, Virginia 22003

*Counsel of Record

Attorneys for Petitioners

APPENDIX

1. Article I, Section 7:

> All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.
>
> Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to the house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.
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> Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

2. Article VI reads in pertinent part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

3. Amendment XIV reads in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .